FOR ARGUMENT

(26)

No. 89-390

Supreme Court, U.S.
FILED
JAN 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,

Petitioner,

vs.

THE LTV CORPORATION; LTV STEEL COMPANY, INC.; THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV STEEL COMPANY, INC. AND CERTAIN AFFILIATES; PARENT CREDITORS COMMITTEE OF THE LTV CORPORATION; LTV BANK GROUP; OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; BANCTEXAS DALLAS, N.A.; FIFTH THIRD BANK; HUNTINGTON NATIONAL BANK; CITIBANK, N.A.; DAVID H. MILLER; AND WILLIAM W. SHAFFER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT LTV BANK GROUP

*JOEL B. ZWEIBEL
Counsel of Record

GEOFFREY M. KALMUS
MICHAEL J. DELL
PETER V. PANTALEO
DOUGLAS R. PAPPAS
KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL
Counsel for Respondent LTV Bank Group
919 Third Avenue
New York, New York 10022
(212) 715-9100

59 PP

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Does section 4047 of ERISA, 29 U.S.C. § 1347, authorize the Pension Benefit Guaranty Corporation ("PBGC") unilaterally to seize from the courts control over a vital aspect of the reorganization of LTV Steel Company, Inc. ("LTV Steel") and The LTV Corporation (collectively, "LTV") under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101 *et seq.*, by:

   a. restoring without prior court approval three pension plans terminated by district court order only eight months earlier, and whose termination was upheld by the court of appeals just two months before; and

   b. substituting its judgment for the holding of the bankruptcy court only two months earlier, reached after full and fair consideration of the PBGC's views and an evidentiary hearing, that interim pension plans established by LTV in 1987 pursuant to statutorily authorized collective bargaining and in settlement of a lawsuit (the "1987 CBA plans") were not unlawful?

2. Assuming the PBGC may in appropriate circumstances order restoration without prior court approval, did the court of appeals err in affirming the district court's order vacating the PBGC's Notice of Restoration where:

   a. the PBGC's decisionmaking process was fundamentally flawed by its failure even to consider critical competing policies of federal bankruptcy law, labor law, and ERISA affected by restoration;

   b. the PBGC's primary purported basis for restoration, that "follow-on plans" are an abuse of ERISA and that the 1987 CBA plans are "follow-on plans," was in error as to both aspects;

   c. the administrative record reveals the PBGC had decided to restore on the "follow-on plan" rationale

whether or not there was any basis for its alternative purported rationale of a material improvement in LTV's financial condition, and ignored its own rules and past analysis in seizing upon that erroneous alternative justification;

d. the PBGC's administrative record did not provide a rational basis for the conclusions drawn by the PBGC; and

e. the procedures by which the PBGC arrived at its decision were grossly inadequate because the PBGC did not apprise LTV or its creditors of the factors on which it would base its decision, give LTV or its creditors an adequate opportunity to offer contrary evidence, proceed under ascertainable standards, include in the record important information necessary to explain its decision, or provide a statement of its reasoning?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 89-390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,

Petitioner,

vs.

THE LTV CORPORATION; LTV STEEL COMPANY, INC.; THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV STEEL COMPANY, INC. AND CERTAIN AFFILIATES; PARENT CREDITORS COMMITTEE OF THE LTV CORPORATION; LTV BANK GROUP; OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; BANCTEXAS DALLAS, N.A.; FIFTH THIRD BANK; HUNTINGTON NATIONAL BANK; CITIBANK, N.A.; DAVID H. MILLER; AND WILLIAM W. SHAFFER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT LTV BANK GROUP

COUNTER STATEMENT OF THE CASE

LTV's Chapter 11 Petition and the Termination of the LTV Steel Plans

On July 17, 1986, The LTV Corporation and its affiliated debtors, including the LTV Steel Company, Inc., filed petitions for reorganization under Chapter 11 of the Bankruptcy

Code, 11 U.S.C. §§ 1101 *et seq.*, in the United States Bankruptcy Court for the Southern District of New York. At the time of LTV's Chapter 11 filing, LTV Steel was the second-largest steel company in the United States. Pet. App. 36a.[1] It was created by the merger of Jones & Laughlin Steel Company, Youngstown Sheet & Tube Company, and Republic Steel Corporation. Pet. App. 36a.

Respondent LTV Bank Group (the "Bank Group") is among the largest of LTV's creditors, having filed proofs of claim totalling more than $925 million.[2] The largest creditor is the PBGC, which claims more than $2 billion as guarantor of four terminated LTV Steel pension plans, the Consolidated Pension Plan for Salaried Employees of Jones & Laughlin Corporation and Subsidiary Companies, Jones & Laughlin Pension Plan (Hourly), Pension Plan of Republic Steel Corporation Dated and Effective as of March 1, 1950 (Hourly), and the Republic Steel Salaried Plan. The PBGC has issued a Notice of Restoration against only the first three of these plans (collectively, "the Plans").

The inability of LTV Steel to meet its funding obligations under the Plans was a primary cause of the financial difficulties leading to its Chapter 11 filing. The plant closings and layoffs

[1] The designation "Pet. App." refers to the Appendix to Petition for Writ of Certiorari, filed with this Court on September 11, 1989. References in the form "JA" are to the Joint Appendix filed on December 14, 1989. Citations to "AR" refer to portions of the administrative record not contained in the Joint Appendix.

[2] The LTV Bank Group consists of many of the major banking institutions in the country, namely Mellon Bank, N.A., for itself and as agent, Manufacturers Hanover Trust Company, for itself and as agent, Bankers Trust Company, Continental Illinois Bank and Trust Company of Chicago, Marine Midland Bank N.A., The Chase Manhattan Bank, N.A., Bank One Columbus, N.A., Security Pacific National Bank, First Republic Bank of Dallas, N.A., MBank Dallas, N.A., Morgan Guaranty Trust Company of New York, Pittsburgh National Bank, Ameritrust Company, N.A., National Bank of Detroit, The Philadelphia National Bank, Norwest Bank Minneapolis, N.A., First Pennsylvania Bank, N.A., National City Bank, First City Bank of Dallas, First Republic Bank, Houston, The Royal Bank of Canada, and First Wisconsin National Bank of Milwaukee.

it had undertaken for the stated purpose of lowering its operating costs led both to massive increases in its pension obligations and to a reduction in its ability to meet those obligations. By 1986, LTV Steel was paying benefits to three retirees for every active worker participating in its pension plans. Pet. App. 37a. Its unfunded liability for future pension benefits exceeded $2 billion. Pet. App. 37a-38a; AR 708-09. In 1985, LTV Steel applied for and received from the Internal Revenue Service, under section 412(d) of the Internal Revenue Code, 26 U.S.C. § 412(d), a waiver of its $175 million minimum funding requirement for the 1984 plan year. The waiver permitted the company to amortize its 1984 pension contribution over a fifteen year period. When LTV Steel's financial difficulties continued in 1986, it sought additional waivers of the more than $205 million it owed for the 1985 plan year and under the amortization agreement for the 1984 plan year. In November, 1986, the IRS ultimately denied that request, revoked the waiver of LTV Steel's 1984 payment obligation, and made the company immediately liable for more than $350 million in contributions for the two years. Pet. App. 37a-38a; JA 122, 233.

In the meantime, on April 1, 1986, LTV Steel signed a collective bargaining agreement with the United Steelworkers of America ("USWA"). The USWA there agreed to concessions which reduced labor costs. Pet. App. 38a.

In September 1986, two months after LTV's Chapter 11 filing, the PBGC invoked the mandatory involuntary termination provisions of ERISA section 4042, 29 U.S.C. § 1342, to obtain court approval to terminate the Republic Steel Salaried Plan. That plan did not have assets to pay benefits when currently due. JA 122.

Thereafter, the PBGC considered whether to take the same action with respect to the three other LTV Steel Plans. The Plans' financial condition was deteriorating. Because LTV Steel's Chapter 11 filing triggered the automatic stay imposed by section 362(a) of the Bankruptcy Code, 11 U.S.C. § 362(a), it was

barred from paying pre-petition debts, including Plan contributions, without bankruptcy court approval. Yet those already-underfunded Plans were distributing approximately $31 million each month to participants.

Although the PBGC's skimpy administrative record does not reveal precisely what the PBGC did,[3] it does disclose a December 15, 1986 meeting of the PBGC's SEPPAA Trusteeship Working Group (the "Working Group"). There, the PBGC's own analyst, Mike Wells, presented an overview of LTV's financial situation.

Mr. Wells was aware LTV expected to have significant operating income and to build up cash, in substantial part due to the bankruptcy stay on payment of pre-petition obligations. For example, LTV's 1987-1988 Operating Plan anticipated operating income would be $426 million in 1987, much of it resulting from the "realization of certain costs avoided in the Chapter 11 environment." JA 16-17. Anticipated operating income for 1988 was another $411 million. JA 18. LTV specifically noted these figures could be even greater if there were stronger than expected GNP growth, favorable government policy initiatives, cost reductions in excess of planned levels, continued or new work stoppages at major competitors, a cold winter, disposals of non-operating units, or improvement in the steel market. JA 20-21, 34, 53. Just a 1% change in average selling price or costs due to these factors would reportedly generate a $41 million change in operating income, while a similar change in volume would change operating income a further $8 to $11 million. JA 52.

Nevertheless, the PBGC's analyst recognized LTV's short-term income and cash buildup would not warrant continuation of the Plans. On the contrary, he concluded "the probability that LTV can survive with the Plans intact is 'de minimis.' " JA 122. The PBGC Working Group identified five key elements of the Plans' cash flow situation for "analysis before making a recommendation on involuntary termination":

[3] Moreover, the PBGC has redacted even its limited memoranda on purported privilege grounds. *E.g.*, JA 130-31, 139.

"a. Estimated annual increased loss if the Plans continue;

b. Estimated amount of benefits being paid above guaranteed levels;

c. Estimated amount of contributions required to bring the funding standards account into compliance;

d. Estimated annual amount of contribution required to maintain the funding standards account; and

F. [sic] Estimated cost of shutdown benefits."

JA 123. There was also to be an analysis of "[e]stimated cost per labor hour to carry the Plans," "[e]stimated cost of labor per ton of steel produced and the percentage the Plans represent per ton," "plants projected to be shutdown and their estimated date," "the [PBGC's] recovery of employer liability under SEPPAA," and "LTV's ability to make required contributions," with a particular "need[ ] to concentrate on LTV's ability to fund the Plans on an ongoing basis to prevent their financial condition from deteriorating further." JA 123-24.

In addition, the PBGC Working Group assigned one of its number to "obtain written confirmation from LTV of their intent to make future contributions with respect to the Plans." JA 124. In response, on December 16, 1986, LTV formally notified the PBGC "because LTV is currently in reorganization under Chapter 11 of the Bankruptcy Code, LTV cannot and will not make contributions to the Plans to eliminate the accumulated funding deficiencies" and "LTV does not intend, and is not likely to have the ability, to fund the Plans for future years." JA 126.

The PBGC Working Group's minutes reflect its continued focus, in determining whether to seek court approval involuntarily to terminate the Plans, on their long term viability, as opposed to "pay-as-you-go" status. *See* 29 U.S.C. § 1002(31); 26 C.F.R. § 1.401-1(b)(2). Thus, while the Group was informed by one of its analysts that "[t]he Plans have assets to carry them

for approximately 4 to 5 years without additional contributions" and "[t]he estimated increase in the underfunding [of the Plans] is approximately $13 million on an annual basis," they were also told the Plans' "estimated underfunding . . . without shutdown benefits [was] $2.4 billion" and "[t]he amount being paid to retirees and beneficiaries under the Plans is approximately $30 million per month of which an estimated $3 million per month is being paid in excess of guarantees." JA 129. Moreover, the PBGC Group recognized even two years of successful LTV operations would not turn things around, and the PBGC could not permit the continuation of the Plans if that would be incompatible with a plan of reorganization under Chapter 11:

> "[A] planned cash buildup of just over $1 billion by the end of 1988 [*i.e.*, at the end of two years] would not be sufficient to finance a plan of reorganization and the ongoing Plans. The group thus concluded that termination would occur; the relevant question was whether it would be now or later."

JA 129. As yet another PBGC analyst concluded: "LTV could not afford to maintain the Plans under their own optimistic projections." JA 129.

On January 5, 1987, the Working Group unanimously recommended "that the plans be involuntarily terminated due to failure to meet the minimum funding standards and to avoid unreasonable deterioration of the financial condition of the plans." JA 140. In light of the PBGC's finding that "[t]he Plans have assets to carry them for approximately 4 to 5 years without additional contributions," JA 129, this decision to seek termination immediately reflected the PBGC's conclusion that a long term perspective is required on the question whether or not to terminate, in keeping with ERISA's concern with "permanent as distinguished from . . . temporary program[s]." 26 C.F.R. § 1.401-1(b)(2); 29 U.S.C. § 1002(31). The January 5 PBGC minutes note that in addition to estimated "due and unpaid employer contributions [of] $385 million as of December 31, 1986 . . . [t]he future contributions requirement for the Plans is $185 million annually." JA 138.

On January 12, 1987, without prior notice to any Plan participants, the PBGC brought an action in the United States District Court for the Southern District of New York, under section 4042 of ERISA, 29 U.S.C. § 1342, to terminate the Plans and be appointed statutory trustee. LTV did not object to the termination. The district court entered consent orders of termination as of January 12, 1987. JA 141-42. That same day, the PBGC recited in papers filed with the bankruptcy court: "the Debtors are apparently at this moment sitting on over $500 million of surplus cash" and "project that LTV and its affiliates will have on a consolidated basis approximately $740 million of cash on hand at the end of 1987 and $1.1 billion at the end of 1988." *See* Objection to Application by Debtors re: Stipulation and Agreement to Provide Post Petition Credit and Resolve Certain Controversies and Demand For Hearing Thereon, dated January 12, 1987, at 8.

As a result of the Plan terminations, the PBGC took control of all Plan assets and became responsible for paying Plan benefits to the extent of the statutory guaranty in ERISA. *See* 29 U.S.C. § 1322. The terminations also liquidated the PBGC's previously contingent claims against the debtors to recover money paid pursuant to its guaranty. The PBGC has filed claims exceeding $2 billion. *See* December 30, 1987 letter from Frank H. McCulloch to Frank Cummings, Exhibit 3 to the Affidavit of James F. Powers, dated January 14, 1988 (page 144 of Joint Appendix filed in the Court of Appeals). If the Plans remain terminated, these claims will be paid pursuant to a plan of reorganization along with those of all other creditors, including the Bank Group. Pet. App. 23a-24a.

The 1987 Interim Collective Bargaining Agreement

The post-termination benefits paid by the PBGC under its statutory guaranty excluded many agreed to in the USWA's pre-Chapter 11 collective bargaining agreement with LTV Steel, such as disability, surviving-spouse, and early retirement benefits. Pet. App. 42a. The USWA launched a three-pronged attack against the benefit cuts. First, it challenged the Plan termination orders in court, appealing unsuccessfully to the court of appeals. *See*

Jones & Laughlin Hourly Pension Plan v. LTV Corp., 824 F.2d 197 (2d Cir. 1987), and *Jones & Laughlin Retirement Plan v. LTV Corp.*, 824 F.2d 202 (2d Cir. 1987). Next, the USWA sued LTV Steel in bankruptcy court, seeking an injunction to compel payment of the non-guaranteed portion of Plan benefits. The PBGC intervened in opposition to the USWA's application, once again recognizing the primacy of the reorganization process over any pre-petition benefit obligations. Thus, the PBGC argued that requiring "the Debtor to continue to pay the pre-petition claims of retirees outside of a Chapter 11 plan of reorganization" would be inconsistent with ERISA and "would pervert . . . the collection scheme for pre-petition debt embodied in the Bankruptcy Code." *See* Pet. App. 43a.

The third and potentially most damaging weapon available to the USWA was a crippling strike. This was no idle threat: the USWA had already struck another Chapter 11 debtor, the Wheeling-Pittsburgh Steel Company, for ninety-one days, over its failure to pay post-termination pension benefits.[4] Moreover, immediately after LTV's Chapter 11 filing, the USWA had struck LTV Steel's most important facility because of the company's initial inability to pay retiree medical benefits. Pet. App. 43a-44a. LTV estimated another strike now would cost the company $100 million per month. That risk was considered unacceptable. Pet. App. 44a. As a witness called by the PBGC at a bankruptcy court hearing later testified, "the costs of a strike were unbelievably high. . . . [I]t was almost a bet the company type proposition whether the company should take on a strike." JA 258.

LTV Steel and the USWA discussed a compromise. After weeks of intense and complicated negotiations, a tentative agreement was reached on May 13, 1987. But the presidents of the USWA locals rejected it. Pet. App. 44a. The parties edged closer to a strike before bargaining resumed. Six weeks later, on June 25, the local presidents narrowly approved an interim collective bargaining agreement to be effective until a plan of reorganization of LTV is approved, subject to termination by either LTV Steel or the USWA if "any of its provisions become unenforceable" or if the PBGC stops paying the guaranteed Plan benefits. Pet. App. 44a.

[4] The USWA also struck USX for six months. JA 153.

The 1987 CBA required LTV Steel to provide new retirement benefits for current employees and to adopt new plans that make up in varying degrees some of the benefits whose loss by retirees produced the greatest hardship when the PBGC took over the Plans. The estimated total annual cost to LTV Steel was $70-$75 million. In return, the USWA agreed to what the company believed would be labor peace, job consolidations, other work rules changes, insurance copayments and the settlement of the USWA's lawsuit for back benefits without additional payment from LTV Steel. Pet. App. 45a. The estimated savings to the company were approximately $50 million. Comparable programs were also provided for the salaried work force. AR 247-48.

The 1987 CBA plans are different from the terminated Plans. Most importantly, none is a defined benefit plan subject to any PBGC guaranty. *See* 29 U.S.C. § 1321(b)(1). On the contrary, the basic plan for active employees is a defined contribution plan.[5] Workers and retirees covered by the new plans also face new burdens. For example, they must share for the first time the cost of health insurance through copayments deducted from their checks. In addition, the new plans contain certain more restrictive eligibility requirements, and some benefits are not necessarily proportional to length of service. Pet. App. 109a.

Before the 1987 CBA was signed, the PBGC informed LTV of its objection to the new plan benefits, on the ground they made up for lost benefits under the terminated Plans. Pet. App. 49a. However, the PBGC was unwilling or unable to specify its objections beyond the broad characterization that the new plans

[5] In a defined contribution plan, separate accounts are created for each worker who, at retirement, becomes entitled only to the benefits which can be purchased by the money in his or her account. *See* AR 301. By contrast, a defined benefit plan is intended to provide each worker with a predetermined monthly benefit payable for his lifetime. AR 1180-86, 1327-40, 1435-46.

were "abusive." AR 523-24, 658. Nor did the agency institute formal rulemaking or adjudicatory proceedings to address the new plan issue. Moreover, the alleged abusiveness of the 1987 CBA plans was the only issue discussed in those conversations; neither LTV Steel's financial status nor its shutdown projections were discussed. AR 523-24, 658.

On July 8, 1987, LTV Steel, supported by the Bank Group and other major creditors, applied to the bankruptcy court for approval of the 1987 CBA. At the hearing, two LTV witnesses testified without contradiction that the interim 1987 CBA was necessary to avoid a crippling strike and to permit LTV and LTV Steel to reorganize. Pet. App. 45a.

The PBGC led the opposition. It submitted affidavits from two of its officials, objecting to portions of the 1987 CBA plans on the ground they constituted a *de facto* restoration of the terminated Plans in violation of PBGC policy. JA 226-37. But the financial advisor to the Creditors' Committee, called by the PBGC, testified he did not believe a better agreement could have been reached, AR 554; LTV Steel would nevertheless have difficulty surviving, AR 546-48; and the "bet the company" risk of a strike was unacceptable. AR 549.

On July 16, 1987, the bankruptcy court approved the 1987 CBA, finding it "clearly necessary and appropriate to the goal of rehabilitation for this Chapter 11 debtor." JA 260. The court's oral opinion noted the special treatment afforded collective-bargaining agreements under bankruptcy law, JA 260, and stressed that both its ruling and the 1987 CBA were interim measures addressing the needs of the ongoing reorganization. JA 261.

Eight times, the PBGC tried unsuccessfully to stay approval and implementation of the 1987 CBA. Pet. App. 46a. The PBGC appealed to the district court the bankruptcy court's July 16, 1987 order approving the 1987 CBA, again raising the "abuse" argument. However, the PBGC later withdrew its appeal. *Id.* Frustrated by the rejection of its arguments in the courts, the PBGC apparently decided to take matters into its own hands.

Initially, the PBGC redoubled its efforts to persuade Congress to amend ERISA to preclude an employer "from establishing retirement programs which in whole or in part, provide substantially similar benefits within five years after termination of a plan that did not have adequate assets to provide PBGC guaranteed benefits." JA 236; H.R. 3545, 100th Cong., 1st Sess. at 1221 (1987). That effort was unsuccessful.

The PBGC also pushed for amendments to ERISA, ultimately adopted as the Pension Protection Act of 1987 ("PPA"), which greatly expanded the PBGC's claim against sponsors of terminated pension plans.[6] The PPA increased the PBGC's claim from 75% of unfunded PBGC-guaranteed plan benefits to 100% of unfunded benefits, whether guaranteed or nonguaranteed. But the PPA did not apply to the termination of the LTV Steel Plans, which occurred before the effective date of the Act. However, if the LTV Plans were restored and subsequently reterminated, and the PPA was held applicable to the retermination, the PBGC's claim against LTV could increase by more than $800 million.[7]

The PBGC's Flawed Decision to Restore the Terminated Plans

On August 6 and 10, 1987, less than a month after the bankruptcy court's July 16 ruling, and while the PBGC's effort to change the law was ongoing, the Working Group met to consider, and then approved, the unilateral restoration of the Plans.

[6] Subtitle D of Title IX to the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987).

[7] LTV has estimated the total PBGC claim for unfunded guaranteed benefits, under the law existing at the time of termination, amounts to approximately $1.817 billion. Under the PPA, the PBGC could claim 100%, rather than 75%, of the unfunded guaranteed liability, increasing its claim by over $600 million. In addition, the PBGC could claim another $200 million in nonguaranteed benefits. Affidavit of James F. Powers, dated January 14, 1988 (page 144 of Joint Appendix filed in the Court of Appeals).

JA 312.[8] The PBGC's scanty minutes note its prior decision "involuntarily [to] terminate[]" the Plans had been made seven months earlier, in January 1987, "due to the Plans' failure to meet minimum funding standards and to avoid unreasonable deterioration of the Plans' financial condition." JA 313. However, the minutes fail to reveal any analysis of most of the key elements of the Plans' status which the PBGC had found so critical in deciding to terminate. *See* pages 4-6 above. Nor do they even discuss the long term perspective and the need to consider whether LTV's financial performance would "be sufficient to finance a plan of reorganization and the ongoing Plans," JA 129, which the PBGC itself had recognized to be the standard back in January, 1987, when the agency was not concerned about having been thwarted in its opposition to the supposedly "abusive" 1987 CBA plans.

The PBGC Working Group's primary cited basis for restoration was in fact its "abusiveness" argument, which had already been presented unsuccessfully to the bankruptcy court. JA 314. To be sure, "the improvement in LTV's financial condition" was also given as a ground for restoration. But the PBGC did "not have sufficient data to predict LTV Steel's long-term cash flow with any certainty," and could only conclude LTV "will generate more than enough cash *in the immediate future* to support the Plans if restored," after assuming without explanation that waivers of contributions already denied by the IRS could be obtained for the 1984 and 1985 Plan years. JA 317-18 (emphasis supplied).

The only other PBGC "financial analysis" included in its meager administrative record is also superficial. The September 15, 1987 memorandum did not even "attempt[ ] to project economic or other factors that will affect LTV in the future." JA 343. It added the "assum[ption]" without explanation that "in the event of restoration, the [1987 CBA] is voided by one

[8] The Group's August 13, 1987 memorandum recommending restoration of three Plans explained "[t]he Group did not decide to include the Republic Retirement Plan (Republic Salaried Plan) at this time since PBGC expects to recover 100 percent of the plan asset insufficiency for this plan." JA 328, 329.

of the parties, but that further bargaining preserves [its] job reductions" savings of $50 million. JA 344. Moreover, it reviewed financial data for only the five month period from January to May 1987 beyond what the PBGC had considered in deciding to terminate the Plans at the beginning of the year. JA 344. There was no reported consideration that the $45 million positive variance between LTV Steel's predicted and actual operating income during those five months — on which the PBGC's entire "financial analysis" was now premised — occurred at a time when a prime competitor, USX, was disabled by a strike which would not (and did not) continue indefinitely. Despite all this, the most the PBGC could say was that a "plausible case can be made" that LTV Steel could support the Plans. JA 345.

LTV had no chance to respond to this finding of material financial improvement. The PBGC minutes purport to show it was a basis for restoration as early as August, JA 318, but the PBGC never so notified LTV. Even when the PBGC's Executive Director wrote on September 18, 1987 to inform LTV the PBGC would consider "any additional information you might wish to supply," she made no reference to the company's ability to maintain the plans. Quite the contrary, she implied the only issue was the effect of the 1987 CBA plans, by reminding LTV it had already been given an opportunity to present information prior to the bankruptcy hearing in July 1987 when the 1987 CBA plans were the only issue. JA 348. Consistent with this, the PBGC's draft Executive Summary prepared in September 1987 — which the PBGC now claims was inadvertently included in its administrative record — states the PBGC would have recommended restoration "in response to LTV's abuse of the pension insurance system, whether or not the company's financial circumstances had changed." JA 350-51.

On September 22, 1987, the PBGC restored the Plans effective as of the date of their termination. The Notice of Restoration cited three purported bases for restoration: (1) LTV's "abuse" of ERISA in establishing the post-termination programs negotiated with the USWA and approved by the bankruptcy court; (2) "LTV Steel's improved financial circumstances"; and (3) "LTV Steel's demonstrated willingness to fund employee

retirement arrangements." Pet. App. 182a-183a. No further explanation or analysis was provided in the Notice.[8]

Proceedings Below

On September 23, 1987, one day after the PBGC issued its Notice of Restoration, LTV obtained an order to show cause from the bankruptcy court, seeking to void the Notice as a violation of the automatic stay under section 362 of the Bankruptcy Code. Two weeks later the PBGC filed an enforcement action in the United States District Court for the Southern District of New York. The two actions were consolidated. The Bank Group and other LTV creditors were permitted to intervene. Pet. App. 51a-52a. Thereafter, motions for summary judgment were filed.

The district court issued its decision on June 22, 1988. The court held that the enforcement action was not barred by the automatic stay, and that under certain circumstances the PBGC was empowered to restore plans without prior judicial approval. But the district court vacated the PBGC's Notice of Restoration, finding the agency had acted arbitrarily and capriciously in a number of important respects:

1. "[T]he PBGC's abuse theory as it relates to post-termination replacement plans [is] necessarily contrary to congressional intent," and the record does not establish the 1987 CBA plans were abusive. Pet. App. 99a-110a.

2. The PBGC improperly ignored LTV's obligation under labor and bankruptcy law to bargain collectively with the USWA concerning pension and retirement benefits, and the ERISA policy favoring the payment of benefits in excess of the statutory guaranty. Pet. App. 102a-106a.

3. The record does not support PBGC claims that LTV Steel's financial condition had improved sufficiently to warrant restoration, nor the PBGC's two critical assumptions that LTV could

[8] The PBGC has since conceded the "willingness to fund" factor is properly subsumed within the other two, and is not an independent basis for the Notice of Restoration. Pet. App. 25a. Accordingly, this factor is not discussed separately here.

obtain minimum-funding waivers from the IRS and that the USWA would allow LTV Steel to retain the $50 million 1987 CBA concessions if the 1987 CBA plans were removed. Pet. App. 110a-118a. Moreover, the PBGC should have recognized ERISA requires the long-term viability of pension plans, not merely the short-term ability to pay benefits, and the extent to which LTV Steel's status as a Chapter 11 debtor affected its balance sheet and its ability to fund pension plans. Pet. App. 112a-117a.

4. The PBGC's restoration procedure was inadequate because the agency did not develop a complete reviewable record; did not set forth its standards with sufficient clarity to permit LTV to challenge them; did not adequately apprise LTV of the grounds for restoration; and did not afford LTV a sufficient opportunity to rebut those grounds. Pet. App. 123a-128a.

The district court remanded to the PBGC for further consideration consistent with its opinion, ordering the agency to limit its analysis to whether LTV was financially able to fund the Plans if restored, consistent with principles of ERISA and bankruptcy law. Pet. App. 130a-131a.

The court of appeals affirmed unanimously. The court found the PBGC focused inordinately on ERISA, failing to consider bankruptcy and labor policies. Moreover, adoption of the 1987 CBA plans did not justify restoration of the terminated Plans. Pet. App. 17a. Nor did "the administrative record . . . support PBGC's finding that LTV's financial circumstances had improved substantially enough to justify restoration": the PBGC could not support its key assumptions about the availability of IRS funding waivers and USWA willingness to allow LTV Steel to retain the $50 million in concessions after restoration; LTV's cash reserves were the natural result of the reorganization proceedings and did not reflect any newfound prosperity; five months' operating income did not establish LTV Steel had the long-term ability to fund the restored Plans; and ERISA's overriding focus is in all events on the long-term viability of plans and there is an unacceptable risk of retermination if the PBGC is allowed to restore plans based on their short-term cash surplus while in Chapter 11 reorganization. Pet. App. 21a-25a. In

addition, the PBGC's procedures for restoration were inadequate because the agency "neither apprised LTV of the material on which it was to base its decision, gave LTV an adequate opportunity to offer contrary evidence, proceeded in accordance with ascertainable standards by which to evaluate when a sponsor's financial condition has so improved as to warrant restoration, nor provided a statement showing its reasoning in applying these standards. Failure to do any of these things renders the decision arbitrary and capricious." Pet. App. 26a.

SUMMARY OF ARGUMENT

1. The PBGC exceeded its authority when it purported to restore the Plans through unilateral administrative action without prior court approval. ERISA section 4047 does not grant the PBGC unbridled discretion to restore plans whenever it wishes. Rather, when read in context with the rest of Title IV of ERISA, it authorizes restoration of plans which have been terminated by court order only upon application to the court that approved the termination and a showing that the factors justifying termination have changed. Any other construction of section 4047 would produce an irreconcilable conflict with ERISA sections 4041(c) and 4042(c), which give the court the final authority to determine whether an underfunded plan of an employer undergoing reorganization can be terminated. The PBGC would have an improper veto power over the termination of plans which have satisfied all the statutory criteria for termination, including court approval.

2. Even assuming the PBGC has the authority to order restoration under appropriate circumstances, its restoration of LTV Steel's Plans was arbitrary and capricious.

a. In evaluating restoration, the PBGC improperly failed to consider numerous critical factors such as competing statutory policies under the bankruptcy and labor laws; whether there were means of dealing with the 1987 CBA plans less disruptive of the reorganization process, such as appealing the bankruptcy court decision approving the interim plans; the statutory criteria of ERISA sections 4041 and 4042 governing plan terminations;

ERISA's overriding policy favoring the fullest possible pension plan coverage for workers and retirees; and whether the PBGC, as LTV's largest creditor, was improperly motivated by a desire to obtain an unauthorized preference and to increase the value of its own claim.

b. The PBGC improperly characterized the 1987 CBA plans as "abusive" as a basis for restoring the terminated Plans. After repeatedly failing to persuade three separate courts that the 1987 CBA plans were abusive, the PBGC may not achieve the same result through administrative procedures which fail even to consider the courts' reasons for ruling against the PBGC. Congress has responded to the risk of abusive termination by enacting strict limits on plan terminations, not by granting the PBGC standardless discretion to restore plans whenever it perceives an "abuse." Moreover, the PBGC's claim that the 1987 CBA plans are "abusive for providing benefits in excess of the statutory guarantee" conflicts with its own position in *Murphy v. Heppenstall Co.*, 635 F.2d 233 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982), in which the PBGC filed a brief arguing that nothing in ERISA imposes a cap on the payment of non-guaranteed benefits.

The PBGC's finding of "abuse" also conflicts with many statutory policies. Congress has repeatedly amended ERISA to enable workers in terminated plans to obtain benefits in excess of the statutory guaranty, and rejected a proposal to ban follow-on plans for five years after a termination. Moreover, federal labor law requires companies in reorganization to bargain over the benefits provided by the 1987 CBA plans.

Nor does the administrative record support the PBGC's conclusion that the 1987 CBA plans are "abusive." The PBGC analysis which concluded that the 1987 CBA plans continued the terminated Plans, looked only to the similarities and did not acknowledge, let alone distinguish, the differences.

c. The administrative record establishes the PBGC would have restored the Plans regardless of whether LTV's finances had improved enough to resume funding the terminated Plans.

The record does not in any event support a finding of sufficient improvement. The PBGC failed to follow its own standards and rules for evaluating LTV's financial health; disregarded ERISA's mandate that plans be viable over the long run in favor of a standard focusing entirely on short-term ability to pay; relied on evidence already known to the agency at the time of termination and on misleading extrapolations from inadequate data; ignored the effects of bankruptcy law on LTV's cash position and the rights of LTV's other creditors; and did not consider the risk of retermination. Moreover, the PBGC's conclusion improperly rests on two unsupported and unsupportable assumptions: that the IRS would grant LTV Steel funding waivers it had previously denied, and that the USWA would allow LTV Steel to retain $50 million in concessions made specifically in return for the "abusive" 1987 CBA plans.

3. Deficiencies in PBGC procedures also rendered its decision to restore arbitrary and capricious. The PBGC never informed LTV of the standards it would use to define "abuse" or "financial improvement," and never notified LTV the agency was even considering restoration based on alleged financial improvement. Moreover, the record compiled by the PBGC omits all testimony and judicial findings contrary to the PBGC's conclusion, and shows signs of having been edited to conceal that the PBGC would have ordered restoration regardless of LTV's finances.

ARGUMENT

I. THE PBGC LACKS THE AUTHORITY TO RESTORE LTV STEEL'S PENSION PLANS WITHOUT PRIOR COURT APPROVAL

The threshold question for this Court in reviewing the PBGC's restoration of the Plans is whether the agency "acted within the scope of [its] authority." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). The PBGC claims to derive from section 4047 of ERISA, 29 U.S.C. § 1347, authority unilaterally to restore the Plans without court order even though they were terminated by court order. Br. Pet. 20-23, 33; *see also* Brief for

the United States as *Amicus Curiae* at 6 n.3. The PBGC argues it may at will restore any single-employer plan terminated by court order, subject only to limited court review of whether the restoration was arbitrary and capricious as measured solely by the PBGC's own interests. In support, the PBGC cites inconclusive fragments of the legislative history, which the district court found "offers little guidance as to the intended scope of the PBGC's restoration authority." Pet. App. 86a n.25.

The PBGC's position is wrong: the agency has acted beyond the scope of its authority in restoring the Plans without court approval, and its Notice of Restoration had to be vacated for this reason alone. Section 4047 actually provides only for the PBGC, "consistent with its duties under this subchapter, to take such action as may be necessary," if it believes a plan should be restored:

> In the case of a plan which has been terminated under Section 1341 or 1342 of this title the corporation is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this subchapter, to take such action as may be necessary to restore the plan to its pretermination status, including, but not limited to, the transfer to the employer or a plan administrator of control of part of all of the remaining assets and liabilities of the plan.

The statute does not define what "action" is "necessary" to restore in the context of a court-approved termination. While section 4047 has not previously been construed by this Court, it does not exist in a vacuum. It has its place in a system where agencies may not overrule courts by fiat. It is part of a larger statutory scheme governing the distress termination of pension plans which contemplates both that a plan sponsor will have an opportunity to be heard and that there will be court involvement, except in certain situations in which the PBGC and the company whose plan is at issue can agree. *See* ERISA §§ 4041 and 4042, 29 U.S.C. §§ 1341 and 1342. To read section 4047 to allow the PBGC unilaterally to restore plans terminated with court approval

pursuant to the detailed criteria and procedures set forth in these related statutory provisions, potentially over the PBGC's objection, would make a farce of the overall legislative framework and lead to absurd results. The PBGC should be required to apply to the court that approved termination and show the factors underlying the termination have changed materially or there is otherwise a valid basis for restoration, not just that its reasons for wanting restoration are not arbitrary and capricious viewed from its own perspective.

A simple example proves the point. Suppose a company in Chapter 11 applies to the bankruptcy court, pursuant to ERISA section 4041(c)(2)(B)(ii), 29 U.S.C. § 1341(c)(2)(B)(ii) (West Supp. 1988), for approval of a distress termination of its pension plan. Suppose further the PBGC opposes the application because it believes (i) other plans adopted by the employer with bankruptcy court approval as part of an interim collective-bargaining agreement to avert a potentially disastrous strike are "abusive," and (ii) the employer's financial circumstances do not warrant a termination. Suppose further the PBGC's opposition to the termination is not "arbitrary and capricious" when viewed solely from the narrow perspective of the PBGC as the largest prospective creditor. But suppose the bankruptcy court nevertheless approves the termination in light of the Bankruptcy Code's overriding policies favoring reorganization, collective bargaining by companies in reorganization and nondiscrimination among unsecured creditors, and ERISA's goal of protecting the pensions of employees and retirees.

Could anyone reasonably argue under these circumstances that Congress intended to authorize the PBGC, without prior court approval, to thumb its nose at the bankruptcy court and unilaterally to restore the terminated plan effective as of the date of the court-ordered termination — in effect nullifying a court order made after a full adversary hearing?

The Decisions Below

The district court nevertheless found "[d]espite the symmetrical appeal of LTV's contention that Congress could not

have intended to grant the PBGC unilateral veto power over court approved termination, established principles of statutory construction compel the conclusion that Congress did intend to grant the PBGC the power to restore terminated plans without first obtaining court approval," Pet. App. 88a, albeit not solely based on the PBGC's own parochial interests as a creditor and insurer. The court's rationale, affirmed by the court of appeals without further analysis, is not persuasive.

First, the district court erroneously relied on the principle that courts may not impose additional procedural requirements on an agency. Pet. App. 88a. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 523-25 (1978). That begs the very question at issue here: whether Title IV procedures for plan terminations *that Congress has imposed* and which make the courts rather than the PBGC the final arbiter of the appropriateness of termination in a bankruptcy reorganization, necessarily apply to the restoration process. If so, *Vermont Yankee* would not bar their enforcement.

Reaching next the question of what Congress actually legislated, the district court was led into error by the PBGC's argument that "the ordinary meaning of the language of section 4047 suggests that the PBGC needs no judicial authorization to restore a plan." Pet. App. 88a.[10] The statute only authorizes

[10] The PBGC now takes this hypertechnical construction one step further in its reading of the first sentence of section 4047, which provides that when the PBGC determines *prior to termination* that termination would be inappropriate, it "is authorized to cease any activities undertaken to terminate the plan, and to take whatever action is necessary and within its power to restore the plan to its status prior to the determination that the plan was to be terminated." Calling restoration "simply the reversal of a termination," and construing that first sentence as literally as the PBGC demands the second sentence be read, the PBGC asserts the power to "stop a termination in progress 'whenever the corporation determines.' " Br. Pet. 33.

The PBGC's overreaching interpretation of what is "within its power" undermines its position. It would allow the agency unilaterally to render section 4041

(Footnote continued)

the PBGC "[i]n the case of a plan which has been terminated under section 4041 or 4042 . . . consistent with its duties under this title, to take such action as may be necessary to restore the plan to its pre-termination status." It is a big and hardly "ordinary" leap from taking "necessary action" that must be "consistent with [the PBGC's duties] under this title" to acting unilaterally to reverse a court order entered pursuant to "this title." Had Congress intended to authorize the PBGC to restore on its own in such an extraordinary situation, it could and would have said so plainly, rather than limiting the PBGC to action that is "necessary," and "consistent with its duties under this title" which requires that courts be the final arbiters of plan terminations pursuant to sections 4041(c) and 4042(c).

The PBGC's argument that section 4047 gives it virtually unlimited discretion to restore pension plans terminated with court approval flies in the face of the well-settled rule that different portions of the same statute — here, provisions setting forth procedures and criteria for termination, and provisions governing restoration — are to be read consistently with each other, rather than so as to produce a hopeless conflict. *See Richards v. United States*, 369 U.S. 1, 11 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its

---

a nullity "whenever [the PBGC] determines," by "stopping a termination in progress" even if it is *sub judice* before a court and the employer has satisfied all the statutory criteria for a voluntary termination. Moreover, it would be inconsistent with section 4042's provision that a trustee appointed during the period a possible termination is being considered may, if it disagrees with a PBGC decision not to seek termination, apply on its own for a court decree terminating the plan.

Actually, it is precisely because restoration is just "the reversal of a termination" — in the PBGC's words — that where Congress has mandated in section 4041 or 4042 that termination shall be by court order possibly entered over the PBGC's objection, it follows logically and as a matter of statutory construction of section 4047 that restoration must too.

object and policy' "); *United States v. Morton*, 467 U.S. 822, 828 (1984).[11] As the PBGC itself recognizes, "[r]estoration under section 4047 is simply the reversal of a termination." Br. Pet. 33. The termination of an underfunded plan of an employer undergoing reorganization involves a proceeding in which the PBGC is free to take such action as may be necessary to either support or contest the proposed termination, but in which the final decision to approve the termination is made by the court pursuant to the express provisions of ERISA sections 4041(c) and 4042(c). To construe section 4047 to allow a restoration in such a case without court approval would be inconsistent with these provisions governing plan termination criteria and procedures. Such a construction would produce a hopeless circularity in which, like a ping pong match, the PBGC could restore a plan that the court ordered terminated over PBGC objections, the court could then again order a termination on the basis of its prior finding that termination was necessary to effect the reorganization, the PBGC could restore for yet another time, and so on.

Moreover, ERISA section 4041(c)(2)(B)(ii)'s mandate that the distress termination of a single-employer pension plan of a company undergoing Chapter 11 reorganization can only be achieved with the express approval of the bankruptcy court reflects

---

[11] Furthermore, "it is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute." *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983). "[A] statute should be interpreted so as not to render one part inoperative." *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

The PBGC's reading of section 4047 as a broad grant of authority is entitled to no deference. As this Court has stressed, "[t]he judiciary is the final authority on the issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984); *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133, 141 (D.C. Cir. 1984). An agency may not rely on its own interpretation to bootstrap its authority beyond its statutory mandate. *SEC v. Sloan*, 436 U.S. 103, 118-19 (1978). These principles have particular force here where the PBGC is far from a disinterested arbiter and has had little prior experience with the provision at issue.

Congress' obvious recognition that the "multiple, competing considerations of a Chapter 11 reorganization" may not be subordinated to one issue or policy. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 525 (1984); *see United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983). That only the bankruptcy court is situated to balance the interests of creditors, the employer and its employees, as well as societal interests in keeping a business operating, applies not just at the termination stage, but also at restoration.[12] Indeed, initial proposals for what became the Single Employer Pension Plan Amendments Act of 1986 ("SEPPAA") would have given the PBGC complete discretion to decide without need for court approval when a plan qualified for distress termination. *See* S. 1227, 98th Cong., 1st Sess. 11-14 (1983). This idea was rejected in favor of definite, objective criteria, including a court order in the case of a reorganization. There would have been little purpose in requiring such a court order and setting such criteria if the PBGC retained complete discretion to restore plans terminated by court order.[13]

---

[12] Similarly, if the PBGC seeks to effect an involuntary plan termination, ERISA section 4042(c), 29 U.S.C. § 1342(c), expressly requires application "to the appropriate United States district court for a decree adjudicating that the plan must be terminated."

In contrast, termination without court order can only occur where a plan sponsor seeks to discontinue a plan and (1) the plan sponsor demonstrates that the plan can meet its benefit obligations, *see* 29 U.S.C. § 1341(b)(1)(D), so that a "standard termination" is effected, or (2) the plan sponsor group is undergoing liquidation in a bankruptcy proceeding, *see* 29 U.S.C. § 1341(c)(2)(B)(i), or (3) the PBGC determines that in the absence of termination an employer "will be unable to pay [its] debts when due and will be unable to continue in business" or that "the costs of providing pension coverage have become unreasonably burdensome to such person, solely as a result of a decline of such person's workforce," *see* 29 U.S.C. § 1341(c)(2)(B)(iii).

[13] The legislative history of SEPPAA suggests Congress recognized the decision whether to restore a terminated plan should rest with the appropriate adjudicative entity, not with the PBGC:

> The Committee recognizes that the PBGC is not (and should not be) in a position to determine whether a proposed termination violates the contractual

(Footnote continued)

The district court placed weight on the provision in section 4047 for the PBGC to "transfer to the employer or a plan administrator . . . control of part of all of the remaining assets and liabilities of the plan," thereby supposedly implying that prior court approval would not be necessary. Pet. App. 88a. The district court read too much into the example. Authorizing the PBGC upon restoration to perform the physical act of transferring assets is not the same as authorizing the creditor to determine on its own when such restoration and transfer is warranted. Indeed, the Conference Report cited by the PBGC explains the corporation may, "when appropriate," make the transfer. Br. Pet. 22.

The district court also believed it significant that other ERISA provisions expressly refer to the need for court orders while section 4047 does not. Pet. App. 89a. But the prior court order requirement for restoration follows ineluctably from that of court approval for the underlying termination, which is clearly set forth in the immediately preceding sections 4041 and 4042 of the statute. The absence of repetition in section 4047, therefore, should hardly be determinative. To quote the PBGC again, restoration is "simply the reversal of a termination." Br. Pet. 33.

Finally, the district court found that allowing PBGC restoration, without prior court approval, of court-ordered plan terminations "is not inconsistent with Title IV's overriding purpose or its statutory scheme." Pet. App. 89a. The court reasoned

---

> or statutory rights of any affected parties. Rather this determination must ultimately rest with the appropriate adjudicative entity, government agency, or court, as the case may be. Furthermore, the decision on what the appropriate remedy should be if the termination is found to have been improper (and specifically, *whether or not the plan should be restored*) also rests with the appropriate adjudicative entity, government agency or court.

H.R. Rep. No. 272, 99th Cong., 2d Sess. 293, *reprinted in* 1986 U.S. Code Cong. & Admin. News 922 (emphasis added).

The PBGC's reliance on the remarks of Senator Nickles (Br. Pet. 23) is misplaced. *See* Pet. App. 96a & n.27. They are the views of a single legislator, were not made at the time Section 4047 was passed, and do not constitute legislative history of any reliable kind. *See United States v. Philadelphia National Bank*, 374 U.S. 321, 348-49 (1963).

such asymmetry was justified because Title IV was intended to protect private pension benefits, and while terminations can lead to immediate benefit reductions, "the immediate effect" of restoration "on participants, whose interests ERISA primarily protects, is either no change or an increase in benefit payments." Pet. App. 89a. That simplistic analysis is defective. As the Conference Committee report on ERISA recognized, employers, as well as participants, have "the right to a court decree of termination." H.R. Conf. Rep. No. 93-1280, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5152. Indeed, section 4042(c), which authorizes the PBGC to apply to the district court for a notice of termination, requires only that notice of the proceeding be given to the plan administrator, which is the employer. The participants, whose interests the district court thought were intended to be paramount at termination, are not even entitled to prior notice. *See Jones & Laughlin Hourly Pension Plan v. LTV Corp.*, 824 F.2d 197, 201 (2d Cir. 1987).

Moreover, restoring a terminated plan to an employer unable to fund it can as surely lead to asset depletion and benefit reductions harmful to participants as can a termination. Thus, the criteria in ERISA section 4042(c) that allow the court to order a termination over the objection of the PBGC include a determination that "the plan must be *terminated* in order to protect the interests of the participants." Similarly, restoration may adversely affect the very jobs and livelihood of the participants if it leaves the employer unable to reorganize in Chapter 11 and forces it to liquidate instead. This case highlights the error underlying the district court's analysis: the USWA, which represents the workers who would supposedly benefit from restoration, in fact *opposes* it because the PBGC's unilateral order of restoration would abrogate those workers' interim labor agreement.

Nor is it enough for the district court to say that aggrieved parties, such as LTV, its creditors and the USWA, can bring an action against the PBGC under 29 U.S.C. § 1303(f). Pet. App. 89a-90a. That transfers the burden to the wrong parties.

Moreover, if the PBGC were allowed to act administratively, the standard of review would be different.[14]

In sum, reading section 4047 to permit the PBGC unilaterally to restore plans terminated by court order would lead to an absurd conflict of powers under ERISA: *termination* of a plan, when the sponsor is in Chapter 11 proceedings, would require permission of the bankruptcy court but not of the PBGC; yet *restoration* could follow immediately whenever the agency disagreed with a court-ordered termination. Nowhere in the PBGC's voluminous submissions to this Court and the courts below has it offered any example of a government agency empowered to undercut or reverse, through informal administrative adjudication, court decisions rendered after appropriate notice and hearing. Section 4047 should not be read to create such an anomaly.

II. ASSUMING THE PBGC HAD THE UNILATERAL POWER TO RESTORE, ITS ORDER WAS ARBITRARY AND CAPRICIOUS

Even assuming section 4047 granted the PBGC the power in an appropriate case unilaterally to restore a pension plan terminated by court order, the court of appeals and the district court correctly found the PBGC's restoration order here was arbitrary and capricious. The PBGC failed to consider all the relevant factors, placed great weight on matters which were not

[14] It is of no moment that termination here was granted by consent upon the PBGC's application under section 4042. Quite to the contrary, Congress expressly granted the employer the rights to be heard and to have a court decide on the question of plan termination under section 4042, and could hardly have intended that those rights be circumvented by the PBGC upon restoration. Moreover, the PBGC has conceded that, but for the USWA's refusal to consent, LTV could have satisfied the distress termination requirements of section 4041. *See Promises at Risk: Report and Recommendations on Single-Employer Pension Plan Termination Insurance Premiums*, Pension Benefit Guaranty Corporation, p. 32 (April 7, 1987). Such a voluntary termination obviously would not have been subject to plenary veto by the PBGC. Accordingly, that this termination was ordered by consent under section 4042 should not foreclose LTV from having a court of appropriate jurisdiction, rather than the PBGC, determine in the first instance whether restoration is warranted.

relevant and did not militate in favor of restoration, and misinterpreted the evidence bearing on the only arguably relevant factor it considered.

A. *The PBGC's purported justifications for restoration are subject to a full and searching judicial review*

The PBGC is an administrative agency subject to the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.* Under the APA, PBGC decisions must be vacated if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).[15] Review of the PBGC's decision must be based on the record the agency presented to the district court. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985).[16]

Judicial review of agency action under the "arbitrary and capricious" standard requires a "searching and careful" inquiry into the facts to determine whether the administrative action was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). Exacting judicial review is necessary to safeguard against actions in which

[15] The Bank Group does not concede the arbitrary and capricious standard is applicable. Plenary *de novo* review is required by the Bankruptcy Code, *see NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), and by the APA because the PBGC's decision was "adjudicatory in nature and the [PBGC's] factfinding procedures [were] inadequate." *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). The court of appeals voided the PBGC's restoration attempt even under the arbitrary and capricious standard.

[16] Several *amici* have now submitted data purporting to reflect the state of the steel industry and other matters during the period following the PBGC's restoration order. *See* Brief Amicus Curiae of Retired Employees Benefit Coalition, Inc.; Brief Amicus Curiae of Armco, Bethlehem Steel Corporation, Inland Steel Industries, Inc., National Steel Corporation, and USX Corporation; Brief for the United States as Amicus Curiae. This purported data is inadmissible and irrelevant in evaluating the PBGC's order. A court may not defer to *post hoc* rationalizations for an agency's actions. *Securities Industry Ass'n v. Board of Governors*, 468 U.S. 137, 143 (1984).

"the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision which runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). An agency may not engage in an "ad hoc determination geared towards reaching a given result in spite of the absence of support." *PBGC v. Potash*, No. CIV-79-130B(E) (W.D.N.Y. 1986) (available on Westlaw, DCT Library).

Particularly where, as here, the administrative agency is not disinterested, but has substantial pecuniary interests that may affect the exercise of its discretion, an especially careful evaluation of its decision is called for. As demonstrated above, the PBGC does not come before this Court as an impartial administrative agency. It is LTV's largest creditor. The record reflects the PBGC was motivated in large part by its own economic interests in attempting to restore the Plans.

B. *The PBGC's attempted restoration was arbitrary and capricious and correctly vacated by the courts below*

The PBGC now cites two justifications for its restoration of the Plans: it believed that (i) the bankruptcy court-approved 1987 CBA plans were "abusive"; and (ii) there was a material improvement in LTV's financial circumstances. As the courts below found, the PBGC's decision was arbitrary and capricious.

The PBGC failed to consider numerous highly material factors militating against restoration. Moreover, the principal factor upon which the PBGC relied does not warrant restoration: LTV's court-approved 1987 CBA plans are not "abusive follow-on plans" and, regardless, are not relevant to restoration. The second, and only arguably appropriate factor purportedly considered by the PBGC was whether LTV Steel could afford the Plans. LTV could not, as the PBGC would have had to conclude had it applied any appropriate measure of financial health. Many were handy in the PBGC's own minutes of its termination

decision seven months earlier, and in its own regulations. Instead, the PBGC ignored all its standards, pulling an ad hoc, self-serving inference from scanty, artificial, and hastily-assembled data.

1. *The PBGC arbitrarily and capriciously failed to consider numerous highly material factors in deciding upon restoration*

The PBGC restoration decision was not "based on a consideration of the relevant factors," *Overton Park*, 401 U.S. at 416 – as the PBGC has conceded is required, JA 229[17] – because it left out numerous highly material considerations which preclude restoration.

First and most important, the PBGC had a duty to consider competing statutory policies, *see, e.g.*, *Burlington Truck Lines v. United States*, 371 U.S. 156, 172-74 (1962), but did not do so. As the court of appeals observed, "[b]ecause ERISA, bankruptcy and labor law are involved in the case at hand, there must be a showing on the administrative record that PBGC, before reaching its decision, considered all of these areas of the law, and to the extent possible, honored the policies underlying them." Pet. App. 14a-15a.

The PBGC erroneously contends the labor and bankruptcy law principles cited by the lower courts are mere "inchoate policies" it is free to disregard. Br. Pet. 39. However, as the PBGC admits (Br. Pet. 43), "Congress itself harmonized the provisions of ERISA with the bankruptcy and labor laws" by providing that "an employer in bankruptcy reorganization may be able to terminate an underfunded pension plan if it can demonstrate

[17] PBGC Executive Director Utgoff, in an affidavit submitted to the bankruptcy court, asserted that in determining whether subsequent plans are abusive "the PBGC views all arrangements together, regardless of their stated purposes, and taking into account all relevant facts and circumstances." JA 229. The PBGC's brief now claims, though, that the agency was not obliged to consider facts and circumstances relating to the labor and bankruptcy laws. Br. Pet. 39-43. The PBGC's litigation posture thus contradicts the affidavit of its own Executive Director.

to the bankruptcy court that it will not otherwise be able to reorganize. *See* 29 U.S.C. § 1341(c)(2)(B)(ii)." Since the PBGC also concedes restoration "is simply the reversal of a termination" (Br. Pet. 33), logic dictates the PBGC cannot restore plans based on the interim 1987 CBA plans, which the bankruptcy court found were "clearly necessary and appropriate to the goal of rehabilitation for this Chapter 11 Debtor," JA 260, where Congress has by statute chosen through plan terminations to promote reorganization over the continuation of underfunded plans. At the very least, the PBGC should have considered this.

Indeed, the PBGC's current argument that these other laws are not "directly related" to restoration is not only obviously incorrect, but also inconsistent with its prior positions. In deciding on termination of the Plans in December 1986, for example, the PBGC itself recognized its obligation to consider whether LTV could afford "to finance a plan of reorganization and the ongoing Plans." JA 129. Similarly, in opposing the USWA's bankruptcy court suit for injunctive relief to compel LTV to pay the non-guaranteed pension benefits not being paid by the PBGC, the agency argued that requiring "the Debtor to continue to pay the pre-petition [pension] claims of retirees outside of a Chapter 11 plan of reorganization would pervert . . . the collection scheme for pre-petition debt embodied in the Bankruptcy Code." Pet. App. 43a. The central tenet of that Code, undermined by the PBGC's restoration decision, is equality of treatment among similarly situated creditors.

The PBGC also failed to consider whether restoration was an appropriate means and whether there were less intrusive and disruptive alternative means to deal with what it thought to be abusive 1987 CBA plans. For example, it could have pursued its appeal from the bankruptcy court's order approving the 1987 CBA which incorporated those plans. If the appeal were successful, there would either have been no CBA plans or CBA plans acceptable to the PBGC, but not restoration.

In addition, the PBGC ignored ERISA's overriding policy favoring the fullest possible pension plan coverage of employees and retirees. As Congressman Walgren stated, the PBGC's

conduct "leave[s] it unclear whether they are serving the interests of those retirees that the PBGC was set up to serve or whether the PBGC has been driven by its motivation for self-preservation." 133 Cong. Rec. E3675 (daily ed. Sept. 23, 1987).

Finally, the PBGC did not consider whether it, as an interested party, was not an appropriate adjudicator of the question of restoration. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980). It can hardly be disputed that the PBGC, while acting as adjudicator, had an important self-interest in restoration because of its position as the largest creditor of LTV and because the impending passage of the PPA would potentially improve its position by at least $800 million in any subsequent Plan termination. *See* page 11 & n.7 above. Indeed, the PBGC's own internal memorandum explaining its decision to attempt restoration of the Plans admits the agency "decided not to recommend restoration of the Republic salaried plan." The only rationale given there was that "facts currently available indicate that PBGC will recover 100 percent of the plan asset insufficiency for that plan." JA 321, 329. Of course, the PBGC's purported reasons for restoring the other terminated Plans — the "abusive" character of the CBA benefit package, and LTV's improved financial condition and "willingness" to fund employee benefits — apply with equal force to the Republic Salaried Plan. The key difference — which was sufficient for the PBGC to decide not to restore that plan — was the PBGC's ability later to recoup all paid guaranteed benefits.

The failure even to consider all of these relevant factors was obviously "arbitrary and capricious." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Standing alone, it requires reversal of the PBGC's "restoration."

2. *LTV's 1987 CBA plans were consistent with rather than an abuse of ERISA; it was arbitrary and capricious for the PBGC to ground restoration in part on the CBA plans*

The first and only real rationale advanced by the PBGC for its restoration decision was that ERISA was "abused" by the 1987

CBA plans, even though LTV agreed to them in an effort to secure labor peace and obtain concessions on the issues of job consolidation, manning requirements and reductions in LTV's cost of health and life insurance for active and retired employees. It was arbitrary and capricious for the PBGC so to conclude, for several different reasons.[18]

As a threshold matter, the PBGC did not act pursuant to any ascertainable written standards, certainly none promulgated before the 1987 CBA plans were negotiated. Rather, as revealed in the minutes of the very first PBGC staff meeting to consider restoration, JA 314, the agency's finding of abuse was based entirely on the affidavits of PBGC officials which had just been considered and rejected by the bankruptcy court, and by every other court which had denied the PBGC's repeated requests to stay implementation of the plans.[19] The PBGC should be collaterally estopped from relitigating this issue or relying on it administratively. *See, e.g., Montana v. United States*, 440 U.S. 147, 155 (1979). Indeed, it also conflicts with the PBGC's own prior legal position in *Murphy v. Heppenstall Co.*, 635 F.2d 233 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982), where the PBGC

---

[18] As noted above, an early draft of the Executive Summary upon which the PBGC Executive Director based her restoration decision states the Working Group "would have recommended restoration in response to LTV's abuse of the pension insurance system, whether or not the company's financial circumstances had changed." JA 351. The final version of this Summary admits LTV's alleged financial improvement was "not the primary basis" for the recommendation to restore. JA 354.

[19] Similarly, the definition of abusive plans contained in the PBGC's brief, Br. Pet. 7, is taken solely from those affidavits, which themselves cite no authority. The only previous PBGC pronouncements on what it considered "abusive" — its three prior opinion letters — did not provide any basis for application to the 1987 CBA plans. As the court of appeals found, these letters addressed circumstances that are factually distinguishable: they involved voluntary rather than involuntary terminations, and did not address the labor and bankruptcy law concerns which must be considered in determining whether LTV's 1987 CBA plans are abusive. Pet. App. 20a. Thus, what the PBGC describes as its "longstanding policy against abusive follow-on plans," Br. Pet. 11, in fact offered LTV Steel and the USWA no guidance at all.

filed a brief supporting the right of retirees to sue the sponsor of a terminated plan to recover lost, nonguaranteed benefits, arguing nothing in ERISA bars a claim for the payment of nonguaranteed benefits. *See* Pet. App. 106a. This position prevailed; as the court of appeals found, "ERISA contains no restriction on employees' rights to receive benefits not guaranteed under ERISA." Pet. App. 19a. At the very least, the PBGC's failure to set clear standards, and to consider *Murphy v. Heppenstall* and the factors relied on by the bankruptcy court in approving the 1987 CBA plans, was arbitrary and capricious.

Beyond that, Title IV of ERISA establishes Congress did not intend the promulgation of successive benefit plans to be a ground for restoration. ERISA sections 4041 and 4042 contain detailed and exclusive standards for distress and other terminations. Nowhere are new benefit plans mentioned. Since "[r]estoration under section 4047 is simply the reversal of a termination," as the PBGC itself recognizes, Br. Pet. 33, it is those section 4041 and 4042 termination criteria, and only those criteria, that are to be weighed in determining the propriety of restoration.

As discussed in detail in the lower court opinions, the legislative history also shows the CBA plans are not material to the question of restoration. Pet. App. 17a-18a, 93a-100a. Confronted by the PBGC with the same specter of dozens of unscrupulous companies trying to unload their unfunded pension liabilities on the agency as the PBGC raises here, together with its proposed statutory limitation on "follow-on" plans (*see* page 11 above), Congress chose to adopt a different solution to the risk of abusive termination.[20] Instead of granting the

[20] The PBGC attempts to blunt the impact of this Congressional rejection of its position by arguing the rejected proposal would have barred *all* follow-on plans, whereas the PBGC now challenges only "abusive" follow-on plans. Br. Pet. 24-25. This purported distinction merely highlights the PBGC's failure to explain which post-termination plans it considers "abusive," and why.

The PBGC's parade of horribles is in all events irrelevant for the simple reason that *it* was the PBGC, not LTV, which sought court termination of the Plans here. The PBGC is fully capable of limiting itself to cases where terminations are truly required. And nothing that happens here will compel the PBGC to seek any other terminations.

PBGC standardless discretion to reverse a termination if subsequent plans make up in whole or in part any of the benefits lost by the termination, Congress enacted stringent criteria to limit terminations, imposed increased termination liability on plan sponsors, and created mechanisms for the replacement of lost benefits that were not guaranteed. Under these new statutory provisions, the PBGC's fear that it will be bankrupted by hundreds of companies seeking to duplicate LTV's "abuse" is wholly unfounded. No company can force the PBGC to assume its unfunded pension liabilities through voluntary termination unless it (a) files for reorganization, with all the attendant business disruption and negative publicity, and (b) persuades a bankruptcy judge that plan termination is necessary for the business to continue.[21] Moreover, assuming a company has terminated its plan, the PBGC still has a claim against the sponsor for the full amount of unpaid benefits. Granting the PBGC the additional authority to restore any plan where it deems there is "abuse" would create no additional deterrent, but — as LTV's experience demonstrates — would encourage the PBGC to elevate its own parochial interest above all competing statutes and policies.[22]

[21] As noted at pages 21-22 n.10 above, the PBGC claims it can stop a termination proceeding dead in its tracks if it so chooses. Br. Pet. 33.

[22] Until 1986, an employer had discretion to terminate a plan whenever it wished, regardless of whether the plan had assets sufficient to pay all PBGC-guaranteed benefits or whether the employer could afford to continue the plan. H.R. Rep. No. 241, part 2, 99th Cong., 2d Sess. at 32, 41, *reprinted in* 1986 U.S. Code Cong. & Admin. News 685, 699. The PBGC's claim against the employer for unfunded guaranteed benefits was capped at 30% of the employer's net worth.

The 1986 SEPPAA amendments prohibited employers from terminating unless the plan contained sufficient assets to pay both guaranteed and vested benefits (a so-called "standard termination"), 29 U.S.C. §§ 1301(a)(16), 1341(b) (Supp. IV 1986), or the employer met the more stringent criteria for a "distress termination," generally including court approval. 29 U.S.C. § 1341(c) (Supp. IV 1986). The PBGC's claim against the employer for unfunded benefits was expanded to the greater of 30% of the company's net worth or 75% of the unfunded guaranteed benefits. 29 U.S.C. § 1362(b)(1)(A) (repealed 1987).

(Footnote continued)

Strong ERISA policies also favor the 1987 CBA plans, in addition to the bankruptcy and labor law provisions discussed at pages 30-31, above. ERISA section 2(a), 29 U.S.C. § 1001(a), contains Congress's finding that employee benefit plans are "an important factor affecting the stability of employment and the successful development of industrial relations." ERISA section 2(b), 29 U.S.C. § 1001(b), provides it is the "policy of this chapter to protect . . . the interests of participants in employee benefit plans and their beneficiaries." Moreover, in 1986 (in SEPPAA), and again in 1987 (in PPA), Congress expressly provided a mechanism for the payment of non-PBGC guaranteed benefits in a distress termination under section 4041 or an involuntary termination by the PBGC under section 4042. *See* ERISA sections 4049 and 4062(c), 29 U.S.C. §§ 1349 and 1362(c) (1986) (added by SEPPAA) and sections 4062(c) and 4062(b)(1)(A), 29 U.S.C. §§ 1322(c) and 1362(b)(1)(A)(1987) (added by PPA). In this context, it is hardly surprising the PBGC has mustered no authority at all for its position that an employer otherwise unable to make all required plan contributions may not contribute to its employees a portion of the difference between what they may have been entitled to under a terminated plan and the PBGC guaranty, particularly when such an agreement will promote industrial peace and reorganization.

Nor would the 1987 CBA plans increase the PBGC's financial exposure. While the terminated Plans were defined benefit plans qualified under section 401(a) of the Internal Revenue Code, 26 U.S.C. § 401(a), and covered by the PBGC insurance program for most of the benefits provided, none of the 1987 CBA plans are covered by PBGC insurance. Rather, they are either qualified defined contribution plans, or welfare or other pension benefit plans of a type outside the PBGC insurance system. The plain implication of SEPPAA is if all requirements for a termination have been met, as the PBGC and the court found they had been at the time of termination in January 1987, the maintenance of a defined contribution plan thereafter would in no way be inconsistent with the termination. Thus, when SEPPAA imposed specific limitations on the right to terminate a qualified defined benefit plan, ERISA section 4041(e) was altered to provide the amendment of a defined benefit plan into a defined contribution plan constitutes a termination of the defined benefit plan and, as such, can be effective only upon satisfaction of the requirements for termination of the defined benefit plan. *A fortiori*, the maintenance of any other type of new plan that is not a qualified defined benefit plan would not vitiate the termination, since the prerequisites for termination in such a case equally would be met.

Finally, the PBGC's administrative record does not in any event support its conclusion that the 1987 CBA plans are in any way abusive. The only analysis proffered by the PBGC to show the 1987 CBA plans were mere continuations of the terminated Plans is four conclusory paragraphs in an affidavit submitted to the bankruptcy court during the PBGC's unsuccessful attempt to block approval of the 1987 CBA plans. *See* JA 234-35. While this analysis lists several similarities between the Plans, it takes no notice whatever of the many substantial differences, including (1) substitution of a defined contribution plan for the much safer, PBGC-insured defined benefit plan; (2) substantial health insurance copayments for all workers and retirees; (3) the loss of tax-preferred status; and (4) certain more restrictive eligibility requirements. The PBGC's utter failure even to note these differences cannot be justified by the agency's rote invocation of its "discretionary authority."

In 1987, Congress imposed still further restrictions on the ability of plan sponsors to terminate plans with unfunded benefits. Under the 1987 PPA, to invoke distress termination without PBGC approval, an employer must either be subject to bankruptcy liquidation proceedings, or be in reorganization proceedings, and the bankruptcy court must approve the termination after determining the termination is necessary for the employer to continue in business and to effect the reorganization. 29 U.S.C. § 1341(c)(2)(B) (West Supp. 1988). The PBGC's claim against the sponsor rose to 100% of unfunded benefits, whether or not vested or guaranteed, 29 U.S.C. § 1362(b)(1)(A) (Supp. 1987). To head off funding troubles before they threatened to require termination, the PPA also increased the minimum funding requirements for underfunded plans. 26 U.S.C. § 412(*l*); ERISA § 302(d), 29 U.S.C. § 1082(d).

3. *It was arbitrary and capricious for the PBGC to base restoration in part on its finding that LTV could afford the terminated Plans*

The PBGC's second purported basis for restoration was that LTV could afford the terminated Plans. That finding was also arbitrary and capricious, for several reasons.

At the threshold, the statement in one of the PBGC's internal memoranda that restoration would be recommended "whether or not the company's financial circumstances had changed," JA 351, raises grave questions whether the PBGC truly grounded its restoration decision on any improved financial situation or whether that was an afterthought, contrived because the PBGC recognized the alleged abusiveness of the 1987 CBA plans alone could hardly justify restoration.

The PBGC did not in any event act pursuant to any ascertainable standard, and arbitrarily ignored the many standards it has promulgated to evaluate the financial well-being of an employer. Contrary to the PBGC's current representation, Br. Pet. 34, the creditor did not even "look[] at the same factors" it had considered at termination. *Compare* pages 4-6 and 11-14 above. Moreover, although the PBGC had proposed detailed regulations for determining whether an employer's financial distress justified termination of its plans, *see* 52 FR 33318 (1987) (to be codified at 29 C.F.R. § 2616.14), the agency never looked to these regulations in concluding LTV's finances had improved. Indeed, while these plan termination regulations require review of projected revenues and expenses (including minimum funding contributions) for each of the next three years, the PBGC acknowledged at restoration it was "not attempting to project economic or other factors that will affect LTV in the future," JA 343, and focused on financial data for only the five months from January through May, 1987.[23]

[23] The PBGC also declined to evaluate LTV Steel's financial health under the criteria it considers in permitting an employer to defer payment of its liability to the PBGC. These factors would include (1) the ratio of LTV Steel's liability

(Footnote continued)

Nor did the PBGC even "attempt[] to project economic or other factors that will affect LTV in the future," JA 343, or to "predict LTV Steel's long-term cash flow," JA 318, much less to consider the risk the Plans would have to be reterminated. On the contrary, the agency steadfastly insisted that when deciding whether to restore, it was not obliged to analyze whether LTV would be able to fund the Plans beyond the immediate short term. Br. Pet. 34-37. However, as the court of appeals held:

> ERISA is concerned with the promulgation and maintenance of plans that are viable in the long term as opposed to those which are uncertain or "pay-as-you-go." *See* 29 U.S.C. § 1002(31). Likewise, section 1.401-1(b)(2) of the IRS Regulations, 26 C.F.R. § 1.401-1(b)(2) (1988), which pertains to deferred compensation and compliance with which is required for PBGC insurance, *see* 29 U.S.C. § 1321(a), states that "[t]he term 'plan' implies a permanent as distinguished from a temporary program." Here, if the restored plans were viable only for a short period of time, they might in the near future once again have to be re-terminated, thereby defeating the purposes and objectives of ERISA and the tax laws.

Pet. App. 24a-25a. The court added, "the resulting vacillation in agency policy would lead to uncertainties on the part of the retirees, plan sponsors, creditors and the government. Such uncertainty is to be avoided where possible." Pet. App. 25a.

to its net worth; (2) the amount and terms of its existing debts; (3) the amount and availability of its liquid assets; (4) LTV Steel's current and past cash flow; (5) LTV Steel's projected cash flow and the impact payment of PBGC liability would have on this cash flow; and (6) the availability of credit from private sector sources. 29 C.F.R. § 2622.8. All of these factors demonstrated LTV Steel could not afford to fund the restored Plans.

The PBGC further failed to follow its standards for evaluating an employer's net worth. In calculating an employer's liability to the PBGC for the agency's payment of guaranteed benefits, the PBGC evaluates an employer's fair market value, including many defined elements of its present financial condition. 29 C.F.R. § 2622.4. Any one of those factors would have showed LTV could not afford its minimum funding obligations or other pension liabilities.

The PBGC responds by disclaiming the ability to predict the long term viability of pension plans. Br. Pet. 36. That claim is disingenuous. 29 U.S.C. § 1342(a)(4) specifically authorizes the PBGC to order termination where "the possible *long-run* loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated," and the PBGC's own earlier analysis at the time of the Plans' termination looked to the long term and concluded that involuntary termination was necessary "to avoid unreasonable deterioration of the financial condition of the plans." JA 140; *see* pages 4-6 above.

Finally, the PBGC's skimpy four-page financial analysis (JA 343-46) does not support its conclusion that LTV's finances had improved sufficiently for it to resume funding the terminated Plans. In reaching that determination, the PBGC estimated the cost of funding the Plans in 1988 would be $260 million, assuming LTV would be able to obtain minimum funding waivers from the IRS for the prior plan years and the USWA would allow the $50 million in concessions negotiated under the 1987 CBA. The PBGC then reasoned that since LTV's current two-year business plan forecast 1987 operating income of $238.5 million, and actual results for the first five months of 1987 were ahead of that pace, "it appears that the debtor will generate more than enough cash during the immediate future (1987 and 1988) to support the reinstatement of the pension obligation." Pet. App. 22a; JA 345.

However, as noted by the court of appeals, the finding of affordability is based on the two fundamental, yet unexplained and unexamined assumptions without support in the record relating to IRS waivers and USWA concessions. Pet. App. 21a-23a. Since the IRS had already denied LTV a waiver for 1986 and revoked its waiver for 1985 there is no basis for the PBGC's conjecture.[24] Similarly, the administrative record

[24] The PBGC argues that because under 26 U.S.C. § 412(f)(3)(A), the IRS is obliged to consult with it before granting large funding waivers, the PBGC

(Footnote continued)

nowhere explains why the USWA would accept the $50 million in concessions if its lost pension benefits were restored through other means.

As for LTV's five-month improvement in financial performance, the PBGC simply ignored that much of it resulted from a short-term factor — a lengthy strike at USX, one of LTV Steel's largest competitors — which rendered the five month results inadequate to project LTV Steel's future cash flow. *See* Pet. App. 113a. The PBGC's conclusion also disregarded the effect of LTV's Chapter 11 status on its balance sheet. For example, while the decision to restore was based in part on LTV's cash on hand (JA 345-46), the PBGC had forecast this cash buildup at the time it ordered termination (JA 129). The increased cash followed naturally from the stay on LTV's debt payments, and did not imply a real improvement in LTV's finances. *See* Pet. App. 23a, 112a-113a. Nor would LTV Steel's performance in Chapter 11 indicate how it would fare after reorganization: while LTV derives short-term benefit from its ability under Chapter 11 to reject burdensome long-term contracts, this may give rise to damage claims which must be satisfied as part of its reorganization. *See* 11 U.S.C. § 365.

The PBGC's "financial analysis" also did not analyze to what extent LTV would have been permitted under the Bankruptcy Code to make contributions to the Plans, absent court order, even if the cash was available to do so. The PBGC cannot contest that when the Plans were terminated, just eight months before restoration, the agency accepted LTV's conclusion that because it "is currently in reorganization under Chapter 11 of the Bankruptcy Code, LTV cannot and will not make contributions to the Plans to eliminate the accumulated funding deficiencies arising upon the denial of the funding waivers identified above." JA 126; *see also* JA 128. However, the PBGC now

has acquired expertise in determining when such waivers would be granted. Br. Pet. 36 & n.22. This argument ignores that under section 412(f)(3)(A) the IRS need not consult with the PBGC before *denying* a waiver, and that the IRS had *already* denied a waiver for the 1984 and 1985 Plan years, only a few months before the PBGC terminated the Plans.

takes issue with the court of appeals' holding that pension contributions, to the extent they are made to pay for benefits accrued in consideration for services rendered prior to LTV's bankruptcy filing, are pre-petition debts entitled to no special priority and not immediately payable. Pet. App. 23a-24a. The PBGC's challenge (Br. Pet. 37-38; *see also* Brief for the United States as *amicus curiae* 22-23 n.18) has no merit.[29]

While the scope of the PBGC's objection to the ruling of the court of appeals is not clear, there can be no question that LTV Steel's minimum funding requirements for the 1984 and 1985 Plan years — which were more than 6 months prior to its July 17, 1986 Chapter 11 filing — are pre-petition obligations on account of pre-petition services. Those contribution obligations, which the PBGC assumed would be waived in restoring the Plans, amounted to more than $350 million. Pet. App. 38a; JA 122, 233.

LTV Steel's minimum funding requirements for subsequent plan years upon restoration would include both past service obligations for pre-petition work, and future service obligations for post-petition work. *See* 29 U.S.C. § 1082(b)(2). The LTV Bank Group does not dispute that contributions for services rendered post-petition may be entitled to an administrative priority (and those for services during the 180 day pre-filing period to a lesser priority). *See* 11 U.S.C. §§ 507(a)(1) and 507(a)(4). The court of appeals did not hold to the contrary nor suggest in any way that LTV Steel could not, for example, continue to make payments under the 1987 CBA plans. On the other hand, post-Chapter 11 contributions on account of services actually rendered more than 180 days before LTV's Chapter 11 filing have no priority and may only be made pursuant to a plan of reorganization which fairly distributes LTV's assets among all pre-petition creditors.

---

[29] The PBGC mistakenly argues that denying its claims priority status will make termination less expensive, thereby increasing the incentive to terminate. Br. Pet. 38-39. Although the PBGC's recovery is reduced if its claims are denied priority, the debtor's incentive to terminate does not increase, since the debtor's assets already belong to its creditors.

The PBGC's claim to the contrary is premised on section 503(b)(1)(a) of the Bankruptcy Code, which allows a first priority for "administrative expenses," including "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case." The administrative expense priority does not, however, cover contributions on account of services rendered prior to a Chapter 11 filing. It is settled that because bankruptcy law presumes that the debtor's limited resources will be equally distributed among his creditors, statutory priorities are narrowly construed. *Joint Industry Board v. United States*, 391 U.S. 224, 228 (1968). "[I]f one claimant is to be preferred over others, the purpose should be clear from the statute." *Nathanson v. NLRB*, 344 U.S. 25, 29 (1952). The purpose of the administrative expense priority is to encourage persons to "do business with the debtor in possession" and thereby promote "rehabilitation of the business" by giving "the debts incurred by the debtor in possession . . . priority over the debts which forced the estate into bankruptcy in the first place." *Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98, 101 (2d Cir. 1986). "Accordingly, an expense is administrative only if it arises out of a transaction between the creditor and the bankrupt's trustee or debtor in possession . . . and only to the extent that the consideration supporting the claimant's right to payment was both supplied to and beneficial to the debtor in possession in the operation of the business. A debt is not entitled to priority simply because the right to payment arises after the debtor in possession has begun managing the estate." *Id. McFarlin's* is a case in point. There, the Second Circuit held withdrawal liability owed to a multiemployer pension plan is not entitled to an administrative priority because it "is made to guarantee pension benefits already earned [pre-petition] by those employees covered by the plan." *Id.*; *accord*, *Amalgamated Ins. Fund v. Kessler*, 55 B.R. 735 (S.D.N.Y. 1985); *In re Great N.E. Lumber & Millwork Corp.*, 64 B.R. 426 (Bankr. E.D. Pa. 1986); *In re Silver Wheel Freightlines*, 57 B.R. 476 (Bankr. D. Or. 1985).[30]

---

[30] Assuredly, the district court in *Columbia Packing Co. v. PBGC*, 81 B.R. 205, 208 (D. Mass. 1988), did rule that statutory funding obligations

(Footnote continued)

As the court of appeals held in this case, Pet. App. 23a, *McFarlin's* analysis would apply equally to any contribution obligations LTV Steel might otherwise have to the Plans upon restoration. Thus, for example, to the extent LTV Steel's contribution obligations to the Plans upon restoration were to pay for pensions to retirees, they would not be entitled to administrative priority because they would be for services rendered long before the Chapter 11 filings. The PBGC has itself argued, in opposing the USWA's bankruptcy court suit for injunctive relief to compel LTV to pay the non-guaranteed pension benefits not being paid by the PBGC, that requiring "the Debtor to continue to pay the pre-petition claims of retirees outside of a Chapter 11 plan of reorganization" would be inconsistent with ERISA and "would pervert . . . the collection scheme for pre-petition debt embodied in the Bankruptcy Code." Pet. App. 43a.

In sum, the PBGC's slipshod financial analysis, like its defective "abuse" arguments, provided no grounds for restoration. The PBGC's decision to go ahead nevertheless was arbitrary and capricious.

---

attributable to the post-petition period represented an expense entitled to administrative priority even to the extent made to fund benefits for service before the petition was filed. We respectfully submit that decision was in error. Such obligations are not an actual and necessary cost or expense of preserving the estate. The consideration for which they arise was not supplied to the estate during the priority period. And the fact that the obligation did not accrue until after the priority period began – which *Columbia Packing* found so important, 81 B.R. at 208-09 – is irrelevant to the analysis. *See McFarlin's, Inc., supra*. That *Columbia Packing* concept would cause every loan or other obligation incurred pre-petition but payable post-petition to become an administrative claim. This would radically change bankruptcy law in a destructive manner since it would cast substantial amounts of unsecured claims into the first administrative status, leaving little, if anything, for other unsecured claims.

In re Robinson Truck Line, Inc., 47 B.R. 631 (Bankr. D. Miss. 1985), also relied upon by the PBGC, is inapposite because it considered the debtor's liability for unfunded pension contributions in the context of a plan of reorganization, not, as here, as a basis for creating a nonstatutory priority claim before a plan of reorganization has even been proposed.

III. DEFICIENCIES IN THE PBGC'S PROCEDURES RENDERED ITS RESTORATION DECISION ARBITRARY AND CAPRICIOUS

Even though ERISA section 4047 does not prescribe specific procedures to be followed by the PBGC in deciding whether to restore, the PBGC does not enjoy unbridled procedural discretion to act as it wishes. As this Court has declared, "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene v. McElroy*, 360 U.S. 474, 496 (1959); *Bowman Transp. v. Arkansas-Best Freight System*, 419 U.S. 281, 288 n.4 (1974). This opportunity for response must come "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The PBGC's procedures here fell far short. In the words of the court of appeals,

> PBGC neither apprised LTV of the material on which it was to base its decision, gave LTV an adequate opportunity to offer contrary evidence, proceeded in accordance with ascertainable standards by which to evaluate when a plan sponsor's financial condition has so improved as to warrant restoration, nor provided a statement showing its reasoning in applying these standards. Failure to do any of these things renders the decision arbitrary and capricious.

Pet. App. 26a.

A review of the administrative record compiled by the PBGC reveals the many serious flaws. For example, the PBGC's Notice of Restoration informed LTV the plans were being restored because LTV had adopted "abusive" follow-on plans and because LTV's finances had improved. However, before issuing the Restoration Notice, the PBGC never told LTV what standards it would use to determine whether the 1987 CBA plans were abusive. There was no notice at all of the PBGC's alternative ground for restoration. After months of discussion with LTV

in which the only issue treated as relevant was whether the 1987 CBA plans were abusive, the PBGC suddenly claimed LTV's improved finances justified restoration without affording LTV any opportunity to present evidence on the issue.[27]

The absence of any explanation of the PBGC's reasoning is also striking. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971). Although the "administrative record" pieced together by the PBGC after the restoration decision was made includes voluminous raw data in the form of detailed descriptions of the terminated Plans, the 1987 CBA plan package, and various governmental filings by LTV, there is little in the way of analysis.[28] The PBGC failed to present any legal support for its asserted power to overrule the bankruptcy court's findings through unilateral administrative action, nor to explain what, if any, factors justified its decision to exercise this purported power. Nor did the PBGC explain why it ignored LTV's long-term financial stability in concluding LTV could fund the restored Plans. Most importantly, the PBGC did not, and does not to this day, offer any grounds other than alleged "administrative discretion" for its complete subordination of labor

---

[27] The court of appeals correctly held that the open-ended invitation by the PBGC for LTV to submit "any additional information you might wish to supply," JA 348, failed to notify LTV the PBGC was looking at LTV's finances as a possible basis for restoration. Pet. App. 26a. *See also* page 13 above. The PBGC's defense that it relied entirely on information provided by LTV (Br. Pet. 48) misses the point: LTV had no way of knowing for what purpose the information was being used, nor what standards were being applied. It had no chance to supply more. The PBGC cannot assert the "discretion" to restore LTV Steel's Plans without conforming to basic standards of fairness necessary to ensure the proper exercise of that discretion.

[28] The size of the administrative record is deceiving. The record contains little of substance. Most of the 1,592 pages are merely copies of LTV's public filings. The PBGC spent fewer than ten pages explaining its actions, and fewer than forty pages contain any regulatory consideration at all. AR 1-14a, 637-45, 1154-55, 1577-84. The record is also one-sided. For example, the PBGC included the direct testimony of its witnesses opposing approval of the 1987 CBA (JA 226-37; AR 197-218), but not the direct testimony of LTV Steel's witnesses supporting approval, even though both views were presented at the same hearing.

and bankruptcy policies to its overriding goals of punishing LTV Steel and enhancing its own position at the expense of LTV's other creditors.

Worse still, the administrative record is incomplete and does not include important information necessary to explain the PBGC's decision. For example, there are just two pages of a draft of an Executive Summary dated September 18, 1987, which the PBGC now claims (without record support) was "inadvertently" included in the record. JA 350-51. This draft suggests the PBGC's decision to restore was in fact based entirely on its desire to punish LTV Steel for its alleged "abuse" of the pension system. But it has been rewritten in the final version, without explanation. JA 354. As the district court observed, these changes "partially belie[] the PBGC's contention that an alleged improvement in LTV Steel's financial improvement was an important factor in the restoration." Pet. App. 110a-111a n.36.

Moreover, the draft Executive Summary contains part of a list of enclosures which includes two important items not found on the corresponding list in the final version, nor elsewhere in the record. One, item 13, is the "Minutes of the Board of Directors meeting held on September 17, 1987." The other, item 12, is "Data sheets setting forth an analysis of plan asset solvency under different scenarios following restoration of the LTV Steel pension plans." LTV and reviewing courts are certainly entitled to know what those analyses involve and whether they do not show the PBGC's conscious consideration of the possibility of restoration and then retermination under the more favorable *to the PBGC* provisions of the PPA, which was expected to be enacted shortly.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be modified and the cause remanded with instructions to vacate the PBGC's Notice of Restoration.

Dated: January 16, 1990

Respectfully submitted,

JOEL B. ZWEIBEL
Counsel of Record

KRAMER, LEVIN, NESSEN,
KAMIN & FRANKEL
919 Third Avenue
New York, New York 10022
(212) 715-9100

Counsel for Respondent LTV Bank Group

Of counsel:

GEOFFREY M. KALMUS
MICHAEL J. DELL
PETER V. PANTALEO
DOUGLAS R. PAPPAS